

**UNITED STATES INTERNATIONAL TRADE COMMISSION**  
**Washington, D.C.**  
**Before the Honorable Paul J. Luckern**

In the Matter of

CERTAIN RUBBER ANTIDEGRADANTS,  
COMPONENTS THEREOF, AND PRODUCTS  
CONTAINING SAME

Inv. No. 337-TA-533

**RESPONSE OF KOREA KUMHO PETROCHEMICAL CO., LTD. TO  
COMPLAINANT FLEXSYS AMERICA L.P.'S PETITION FOR REVIEW OF  
FINAL INITIAL AND RECOMMENDED DETERMINATIONS**

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	STANDARD OF REVIEW .....	3
III.	ARGUMENT .....	4
A.	The ALJ Correctly Determined Under the Existing Law and Undisputed Facts That KKPC Does Not Infringe.....	4
1.	KKPC Does Not Infringe By Itself.....	5
2.	KKPC Does Not Jointly Infringe.....	5
B.	§ 1337(a)(1)(B)(ii) Was Not Intended To And Does Not Prohibit Conduct That Would Not Be Infringing In the United States .....	7
1.	The Statutory Language Requires Infringement.....	9
a)	The Title of § 1337 Indicates Congress' Intent To Require Infringement.....	9
b)	The Language of § 1337(a)(1)(B)(ii) Indicates Infringement Is Required .....	9
c)	The Language of Other Statutes That Define Infringement Is Essentially The Same as The Language of § 1337(a)(1)(B)(ii) .....	10
d)	ITC and Federal Court Decisions Indicate § 1337(a)(1)(B)(ii) Requires Infringement .....	11
e)	Interpreting § 1337(a)(1)(B)(ii) As Requiring Infringement Is Necessary To Avoid Conflict With Other Provisions of § 1337 .....	12
2.	The Legislative History Clearly Requires Infringement.....	14
3.	The Legislative History Of 35 U.S.C. §271(g) Does Not Support Flexsys' Interpretation of § 1337(a)(1)(B)(ii) .....	20
C.	The ID Of No Violation With Respect To KKPC Is Consistent With The Policies Underlying §1337(A)(1)(B)(ii) And Is Logical .....	25
D.	The Avery And Dupont Cases Do Not Support Flexsys' Position That No Proof Of Infringing Conduct Is Required With Respect To Production Of The Imported Article.....	28

E.	Flexsys Waived The Argument That KKPC Violated The Tariff Act By Selling For Importation Into The United States 6ppd Made "By Means Of" A Process Covered By Claim 30 Of The '063 Patent And Claim 7 Of The '111 Patent, And The Argument Is Without Merit In Any Event .....	34
1.	Flexsys Waived The Argument That KKPC's 6PPD Is Made "By Means Of" A Process Covered By Claim 30 Of The '063 Patent And Claim 7 Of The '111 Patent.....	35
2.	Flexsys' Argument That KKPC's 6PPD Is Made "By Means Of" A Process Covered By Claim 30 Of The '063 Patent And Claim 7 Of The '111 Patent Is Without Merit As A Matter Of Law.....	37
IV.	CONCLUSION.....	38

## TABLE OF AUTHORITIES

### **Cases**

<i>Amgen Inc. v. United States International Trade Commission</i> , 902 F.2d 1532 (Fed. Cir. 1990)	10, 17, 19
<i>Avery Dennison Corp. v. UCB Films PLC</i> , No. 95 C 6351, 1997 WL 567799 (N.D. Ill. Sept. 4, 1997)	6, 26, 27
<i>Avery Dennison Corp. v. UCB Films PLC</i> , No. 95 C 6351, 1997 WL 665795 (N.D. Ill. Oct. 20, 1997)	6, 29
<i>Bayer AG v. Housey Pharms., Inc.</i> , 340 F.3d 1367 (Fed. Cir. 2003)	18
<i>Bio-Technology General Corp. v. Genentech, Inc.</i> , 80 F.3d 1553 (Fed. Cir. 1996)	34, 35
<i>Bristol-Myers Co. v. Erbamont, Inc.</i> , 723 F. Supp. 1038 (D. Del. 1989)	18
<i>Canton Bio-Medical v. Integrated Liner Techs.</i> , 216 F.3d 1367 (Fed. Cir. 2000)	5
<i>Deluxe Corp. v. United States</i> , 885 F.2d 848 (Fed. Cir. 1989)	7
<i>Diversified Prods. Corp. v. Weslo Design Int'l, Inc.</i> , 616 F. Supp. 1134 (D. Del. 1985)	18
<i>Eli Lilly and Co. v. American Cyanamid Co.</i> , 896 F. Supp. 851 (S.D. Ind. 1995)	34
<i>Faroudja Laboratories, Inc. v. Dwin Elecs., Inc.</i> , No. 97-20010 SW, 1999 WL 111788 at *5 (N.D. Cal. Feb. 24, 1999)	6, 28
<i>Fromson v. Advance Offset Plate, Inc.</i> , 720 F.2d 1565 (Fed. Cir. 1983)	5, 6, 28
<i>Hazani v. U.S. Int'l Trade Comm'n</i> , 126 F.3d 1473 (Fed. Cir. 1997)	33
<i>Huffman v. Office of Personnel Management</i> , 263 F.3d 1341 (Fed. Cir. 2001)	20
<i>In re Amtorg Trading Corp.</i> , 75 F.2d 826 (C.C.P.A.), <i>cert. denied</i> , 296 U.S. 576 (1935)	8, 12, 13
<i>Int'l Rectifier Corp. v. Samsung Elecs. Corp.</i> , 361 F.3d 1355 (Fed. Cir. 2004)	8
<i>Joy Technologies, Inc. v. Flakt, Inc.</i> , 6 F.3d 770 (Fed. Cir. 1993)	27
<i>Joy Techs v. Flakt, Inc.</i> , 6 F.3d 770 (Fed. Cir. 1993)	5
<i>Kinik Co. v. Int'l Trade Com'n</i> , 362 F.3d 1359 (Fed. Cir. 2004)	12, 18, 33, 34
<i>Lannom Mfg. Co. v. U.S. Int'l Trade Comm'n</i> , 799 F.2d 1572 (Fed. Cir. 1986)	7, 10, 11
<i>Marley Mouldings Ltd. v. Mikron Indus., Inc.</i> , No. 02 C 2855, 2003 WL 1989640 (N.D. Ill. April 30, 2003)	5
<i>Merrill Lynch, Pierce, Fenner &amp; Smith v. Curran</i> , 456 U.S. 353 (1982)	19
<i>Metal Film Co. v. Metlon Corp.</i> , 316 F. Supp. 96 (S.D.N.Y. 1970)	5, 27
<i>NTP v. Research in Motion</i> , 418 F.3d 1282 (Fed. Cir. 2005)	4
<i>Ralston Purina Co. v. Far-Mar-Co, Inc.</i> , 586 F. Supp. 1176 (D. Kan. 1984), <i>aff'd in part</i> , 772 F.2d 1570 (Fed. Cir. 1985)	5, 27
<i>RF Delaware v. Pacific Keystone Techs.</i> , 326 F.3d 1255 (Fed. Cir. 2003)	4

<i>San Huan New Materials High Tech, Inc. v. U.S. Int'l Trade Comm'n</i> , 161 F.3d 1347 (Fed. Cir. 1998).....	11
<i>Sealed Air Corp. v. U.S. Int'l Trade Comm'n</i> , 645 F.2d 976 (CCPA 1981) .....	20
<i>Shields v. Halliburton Co.</i> , 493 F. Supp. 1376 (W.D. La. 1980).....	5, 27
<i>Strickland v. United States</i> , 423 F.3d 1335 (Fed. Cir. 2005).....	19
<i>Vastfame Camera, Ltd. v. U.S. Int'l Trade Comm'n</i> , 386 F.3d 1108 (Fed. Cir. 2004) .....	7
<b>Statutes</b>	
19 U.S.C. § 1337(a)(1)(B)(ii) .....	passim
35 U.S.C. § 271.....	9
35 U.S.C. § 282(1).....	11
35 U.S.C. §271(a) .....	17
35 U.S.C. §271(g).....	2
<b>Other Authorities</b>	
H.R. Rep. No. 100-60 .....	18
H.R. Rep. No. 76-1781 at 1-2 (1940) .....	15
S. Rep. No. 100-83.....	20
S. Rep. No. 76-1903 (1940).....	15
Sen. Rep. of Proceedings Held Before the Comm. on Mines and Mining, May 17, 1940 .....	15
<b>Regulations</b>	
19 C.F.R. § 210.43(b)(1).....	3
19 C.F.R. § 210.43(b)(i).....	24
19 C.F.R. § 210.43(c).....	1
<b>Administrative Decisions</b>	
<i>Carbon and Certain Alloy Steel Products</i> , Inv. No. TA-201-51, 1984 ITC LEXIS 193 (July 1984) .....	4
<i>Certain HSP Modems, Software and Hardware Components Thereof, and Products Containing Same</i> , Inv. No. 337-TA-439, Initial Determination (October 18, 2001) .....	32
<i>Certain Plastic Molding Machines</i> , Inv. No. 337-TA-462, 2003 ITC LEXIS 417, *31 (July 2003).....	16
<i>E.I. Dupont de Nemours and Co. v. Monsanto Co.</i> , 903 F. Supp. 680 (D. Del. 1995).....	5, 30
<i>In the Matter of Certain Hardware Logic Emulation Systems and Components Thereof</i> , Inv. No. 337-TA-383 (Oct. 9, 1997) .....	21
<i>In the Matter of Certain Process, Apparatus, and Components Thereof</i> , Inv. No. 337-TA-313 (Oct. 17, 1990) .....	18
<i>In the Matter of Certain Recombinant Erythropoietin</i> , Inv. No. 337-TA-281, 1989 ITC LEXIS 57, *14 (April 10, 1989).....	10, 18

<i>In The Matter of Certain Recombinantly Produced Human Growth Hormones</i> , Inv. No. 337-TA-358, 1994 ITC LEXIS 640, *90.....	10, 18, 21
<i>In the Matter of Certain Variable Speed Wind Turbines and Components Thereof</i> , Inv. No. 337-TA-376 (May 30, 1996) .....	20
<i>Portable Electric Typewriters From Singapore</i> , Inv. No. 731-TA-515, 1993 ITC LEXIS 642, *52 (Sept. 1993) .....	4

## **I. INTRODUCTION**

Respondent Korea Kumho Petrochemical Co., Ltd. ("KKPC") respectfully submits this response to Complainant Flexsys America L.P.'s ("Flexsys") Petition for Review of Final Initial and Recommended Determinations ("Initial Determination") in the captioned investigation pursuant to 19 C.F.R. § 210.43(c).

In his February 21, 2006 Final Initial and Recommended Determination ("ID"), the ALJ correctly concluded that, under the undisputed facts and the existing law, KKPC did not infringe any of the asserted claims of Flexsys' patents in suit, and therefore did not violate 19 U.S.C. § 1337(a)(1)(B)(ii). (ID at 104-105, 138).

Significantly, Flexsys' petition does not seek review of the ALJ's factual findings that:

- (1) KKPC and Sinorgchem are separate and independent entities (ID at 135-136);
- (2) The only relationship between KKPC and Sinorgchem is that of commercial buyer and commercial supplier (ID at 105);
- (3) Flexsys' asserted claims all recite multiple steps to produce 4-ADPA and 6PPD (ID at 104);
- (4) KKPC does not itself produce 4-ADPA by any process, but only performs a single reductive alkylation step on 4-ADPA it purchases on the open market, including from Sinorgchem, to produce 6PPD. (ID at 103-104); and
- (5) KKPC does not know of and has no involvement in Sinorgchem's process for producing 4-ADPA (ID at 105).

Flexsys also does not seek review of the ALJ's determination that, under the existing law and undisputed facts, KKPC does not itself infringe the asserted claims because it does not carry out all of the steps of the patented processes. (ID at 104)<sup>1</sup>

Flexsys' Petition repeatedly accuses KKPC and Sinorgchem of "collectively" practicing its patented processes. However, Flexsys does not seek review of the ALJ's factual findings that KKPC and Sinorgchem are separate and independent entities, that their only connection is that of commercial seller and purchaser, and that KKPC is not aware of and has no involvement in Sinorgchem's process. Accordingly, Flexsys has given the Commission no basis to review the ALJ's determination that KKPC does not jointly infringe. (ID at 104-105)<sup>2</sup>

Flexsys' petition nevertheless urges the Commission to expand the scope of §1337(a)(1)(B)(ii) to capture KKPC's conduct, even though it would not be infringing if carried out inside the United States, and to find that KKPC engaged in unfair competition in violation of the Tariff Act. Flexsys predominantly relies on the legislative history of 35 U.S.C. §271(g) and on various federal court decisions based on that statute. However, as shown herein, §271(g) is a different statute than § 1337(a)(1)(B)(ii), enacted at a different time, and with a different legislative history. Flexsys' authorities are readily distinguishable and are inapplicable.

Flexsys urges the Commission to review the ALJ's determination that KKPC has not violated § 1337(a)(1)(B)(ii), alleging that it impacts Commission policy, and citing to 19 C.F.R.

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<sup>1</sup> The ALJ also properly found that KKPC did not indirectly infringe by inducing or contributing to infringement. (ID at 104-105). Flexsys' petition also does not seek review of that determination.

<sup>2</sup> Flexsys' petition repeatedly misstates or mischaracterizes KKPC's position as being that infringement requires a single entity to carry out all of the steps of a process claim. See, for example, Flexsys Petition at 8. In fact, KKPC has been clear throughout this investigation in recognizing that a number of courts also have considered joint infringement by multiple entities, but only where there is a sufficient "connection" between the entities. In any event, the undisputed evidence here established there was no such connection between KKPC and Sinorgchem.



§ 210.43(b)(1)(iii). However, Flexsys does not indicate what policy of the Commission requires review in this instance, especially where Flexsys does not seek review of the ALJ's factual findings that clearly establish non-infringement under the existing law. Rather, it appears Flexsys is urging the Commission to place itself in the position of Congress and to make new law by expanding the scope of § 1337(a)(1)(B)(ii) to define as unfair competition conduct that would not be infringing even if conducted in the United States, characterizing this proposition as an "issue of first impression." Such an expansion of § 1337(a)(1)(B)(ii) would be unprecedented, and would extend the scope of § 1337(a)(1)(B)(ii) well beyond what Congress clearly intended when it enacted it, and well beyond how the Commission and the courts have applied the statute in the past. Flexsys does not seek a review of Commission policy, but rather enactment of new legislation.

The expansion of § 1337(a)(1)(B)(ii) to capture conduct that would not be infringing under existing United States law even if it occurred inside the United States, is a matter for Congress. The Commission need not and should not review the ALJ's ID of non-infringement with respect to KKPC, which is clearly correct under the undisputed facts and existing law as Flexsys urges.

## **II. STANDARD OF REVIEW**

Rule 210.43(b)(1) establishes the standards to be used in deciding whether to review an Initial Determination. Review is appropriate where:

- (i) a finding or conclusion of material fact is clearly erroneous;
- (ii) a legal conclusion is erroneous, without governing precedent, rule or law, or constitutes an abuse of discretion; or
- (iii) the determination is one affecting Commission policy.

19 C.F.R. § 210.43(b)(1).

Here, Flexsys' Petition does not seek review of the ALJ's factual findings underlying the determination that KKPC did not infringe any asserted claim of the patents either alone or jointly, and therefore did not violate § 1337(a)(1)(B)(ii). Those findings therefore stand undisputed, and there is no basis for review.

Flexsys seeks review on the basis that the ALJ's determination allegedly affects some unnamed and undetermined Commission policy under § 210.43(b)(iii).<sup>3</sup> Contrary to Flexsys' allegation, however, the ALJ's ID is completely consistent with the Commission's policy under § 1337(a)(1)(B)(ii), which is to prevent damage to domestic industries by unfair competition. The ALJ properly concluded that KKPC did not engage in infringing conduct in producing its 6PPD, that the subsequent importation of that product into the United States therefore does not constitute an act of unfair competition, and that, therefore, there has been no violation of § 1337(a)(1)(B)(ii).

### **III. ARGUMENT**

#### **A. The ALJ Correctly Determined Under the Existing Law and Undisputed Facts That KKPC Does Not Infringe**

##### **1. KKPC Does Not Infringe By Itself**

The legal and factual basis of KKPC's non-infringement is quite simple. Existing law requires that in order to infringe a patented process, an entity must perform all of the steps of the patented process. *NTP v. Research in Motion*, 418 F.3d 1282, 1317-18 (Fed. Cir. 2005); *RF Delaware v. Pacific Keystone Techs.*, 326 F.3d 1255, 1267 (Fed. Cir. 2003), *Canton Bio-Medical*

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<sup>3</sup> Flexsys is urging the Commission to violate its own policy by putting itself in the position of Congress and to make new law expanding the scope of § 1337(a)(1)(B)(ii). See, e.g., *Portable Electric Typewriters From Singapore*, Inv. No. 731-TA-515, 1993 ITC LEXIS 642, \*52 (Sept. 1993) ("the Commission is not a law- or policy-making body"); *Carbon and Certain Alloy Steel Products*, Inv. No. TA-201-51, 1984 ITC LEXIS 193, 196 (July 1984) ("This Commission may not substitute its judgment for that of Congress.").

*v. Integrated Liner Techs.*, 216 F.3d 1367, 1370 (Fed. Cir. 2000); *Joy Techs v. Flakt, Inc.*, 6 F.3d 770, 773 (Fed. Cir. 1993). Here, the undisputed evidence demonstrated quite clearly that the asserted claims require at least three steps, but that KKPC only carried out a single reductive alkylation step. The ALJ thus properly determined that KKPC did not directly infringe the asserted claims. (ID at 102-105).

## **2. KKPC Does Not Jointly Infringe**

Similarly, the legal and factual bases why KKPC did not jointly infringe with Sinorgchem any of Flexsys' asserted claims is simple. A number of courts have considered whether and under what circumstances multiple entities can be held to have jointly infringed a patented process where none of the entities carried out all of the process steps. Every court that has considered the issue, of which KKPC is aware, has required that in order to jointly infringe, there must at a minimum exist some substantial "connection" between the entities who jointly or collectively perform all of the steps. Thus, joint infringement has been found where one entity contracted with another to carry out steps of the process for it. *E.I. DuPont de Nemours and Co. v. Monsanto Co.*, 903 F. Supp. 680 (D. Del. 1995). Joint infringement has also been found where one entity was the agent of the other. *Shields v. Halliburton Co.*, 493 F. Supp. 1376, 1389 (W.D. La. 1980); *Ralston Purina Co. v. Far-Mar-Co, Inc.*, 586 F. Supp. 1176, 1226 (D. Kan. 1984), *aff'd in part*, 772 F.2d 1570 (Fed. Cir. 1985); *Metal Film Co. v. Metlon Corp.*, 316 F. Supp. 96, 110 n.12 (S.D.N.Y. 1970). Joint infringement has also been found where one entity specified or controlled certain aspects of the process carried out by another entity. *Marley Mouldings Ltd. v. Mikron Indus., Inc.*, No. 02 C 2855, 2003 WL 1989640 (N.D. Ill. April 30, 2003). However, where as here, the only connection between the entities is that of commercial seller and purchaser in the open market, the courts have found an insufficient connection for joint infringement. *See Fromson v. Advance Offset Plate, Inc.*, 720 F.2d 1565 (Fed. Cir. 1983);

*Faroudja Labs., Inc. v. Dwin Elecs., Inc.*, No. 97-20010 SW, 1999 WL 111788 at \*5 (N.D. Cal. Feb. 24, 1999); *see also Avery Dennison Corp. v. UCB Films PLC*, No. 95 C 6351, 1997 WL 567799 (N.D. Ill. Sept. 4, 1997) ("Avery I"); *Avery Dennison Corp. v. UCB Films PLC*, No. 95 C 6351, 1997 WL 665795 (N.D. Ill. Oct. 20, 1997) ("Avery II") .

Here, the ALJ properly found on undisputed evidence that KKPC and Sinorgchem are separate and independent entities, that the only relationship between them is that of commercial seller and purchaser in the open market, and that KKPC did not know and had no involvement in Sinorgchem's process. On this undisputed evidence, the ALJ properly determined that KKPC did not jointly infringe the asserted claims. (ID at 104-105).

Rather than repeat KKPC's entire non-infringement argument in detail, KKPC respectfully refers the Commission to the Post-Hearing Brief of Respondents at 60-62 and the Post-Hearing Reply Brief of Respondents at 51-59.

**B.     § 1337(a)(1)(B)(ii) Was Not Intended To And Does Not Prohibit Conduct That Would Not Be Infringing In the United States**

As an initial matter, throughout its petition Flexsys repeatedly misstates or mischaracterizes the critical issue. *See, e.g.*, Flexsys Petition at 1, 8. The issue is not, as Flexsys frames it, that § 1337(a)(1)(B)(ii) does not require a single entity to perform all of the steps of a claimed process. The issue as properly framed is whether § 1337(a)(1)(B)(ii) encompasses *conduct* of an entity or entities in producing an imported article that would not have been infringing if it occurred in the United States.

Where, as here, a seller and customer in the open market separately and independently each perform some but not all of the steps of a patented process to produce an article, their conduct is not infringing under current U.S. law. *See Fromson, supra; Faroudja, supra*. The critical question raised by Flexsys' petition is whether such non-infringing conduct is

nevertheless unfair competition in violation of § 1337(a)(1)(B)(ii) when it occurs outside the United States and the resulting product is imported into the United States.

In determining the proper construction of § 1337(a)(1)(B)(ii), the courts must give effect to the intent of Congress. *Lannom Mfg. Co. v. U.S. Int'l Trade Comm'n*, 799 F.2d 1572, 1579 (Fed. Cir. 1986) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984)). Where the text of the statute does not clearly exclude alternative interpretations, courts look to the legislative history of the statute to illuminate Congressional intent. *E.g., Deluxe Corp. v. United States*, 885 F.2d 848, 850 (Fed. Cir. 1989). Proper construction of a statute does not authorize an agency to exceed the authority Congress granted it. *Lannom*, 799 F.2d at 1580. "The ultimate question is 'one of congressional intent, not one of whether [the] Court thinks that it can improve upon the statutory scheme that Congress enacted into law.'" *Id.* (quoting from *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979)). A proposed construction of the statute only will be upheld if it is "permissible" – *i.e.*, "reasonable in light of the language, policies and legislative history of the statute." *Vastfame Camera, Ltd. v. U.S. Int'l Trade Comm'n*, 386 F.3d 1108, 1111 (Fed. Cir. 2004) (citations omitted). Here, as discussed below, Congress clearly demonstrated in the language of the statute itself and in its legislative history its intent to prohibit as unfair competition only conduct that would have constituted infringement if it occurred in the United States.

#### **1. The Statutory Language Requires Infringement**

Flexsys' proposed construction of § 1337(a)(1)(B)(ii) would eliminate the need to show any infringing conduct by an entity in order to prove unfair competition in violation of the statute. That construction is inconsistent with the language of the statute itself, and renders § 1337(a)(1)(B)(ii) inconsistent with other provisions of § 1337. For these and other reasons set out below, Flexsys' construction is neither "reasonable" nor "permissible."

**a)     The Title of § 1337 Indicates Congress' Intent To Require Infringement**

First, the title of § 1337 is "Unfair practices in import trade," and the title of § 1337(a) is "Unlawful activities ...." Both titles clearly indicate Congress' intention to prohibit unfair and unlawful conduct, i.e., infringing conduct, not conduct that if carried out in the United States would not be infringing, and therefore, not unfair or unlawful. *See In re Amtorg Trading Corp.*, 75 F.2d 826, 834 (C.C.P.A.), *cert. denied*, 296 U.S. 576 (1935) (conduct that is not infringing under the law does not constitute "unfair methods of competition" or "unfair acts in importation").

**b)     The Language of § 1337(a)(1)(B)(ii) Indicates Infringement Is Required**

Second, the language of the statute itself indicates that infringement is required. § 1337(a)(1)(B)(i) refers to the "importation ... of articles that -- infringe a valid and enforceable United States patent ...." However, United States patents only have effect in the United States and therefore infringement only occurs in the United States. *Int'l Rectifier Corp. v. Samsung Elecs. Corp.*, 361 F.3d 1355, 1360 (Fed. Cir. 2004). In view of that territorial limitation, § 1337(a)(1)(B)(ii) also refers to "importation ... of articles that -- are made ... by ... a process covered by the claims of a valid and enforceable United States patent." The language of subsection (ii) essentially tracks the language of subsection (i) in prohibiting importation of certain articles, but does not use the word "infringement" per se because it is intended to encompass conduct occurring outside the United States, such as performing the steps of a patented process. That conduct is not technically infringing outside the United States, but would be if it occurred in the United States. Because Congress could not reach the extra-territorial conduct itself, it reached the subsequent importation of the resulting articles to the same extent as

if infringement had occurred in the United States. Subsection (ii) thus uses the word "covered" synonymously with "infringed."

**c)     The Language of Other Statutes That Define  
Infringement Is Essentially The Same as The Language  
of § 1337(a)(1)(B)(ii)**

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Third, the language used in § 1337(a)(1)(B)(ii) is essentially identical to the language used in other statutory provisions that define patent infringement for conduct occurring in the United States. Thus, the "covered by the claims of a ... United States patent" language used in § 1337(a)(1)(B)(ii) is nearly identical to language used in 35 U.S.C. § 271, which is entitled "infringement of [a] patent." 35 U.S.C. § 271(a) defines infringement as making or importing a "patented invention," and § 271(g) defines infringement as importing a "product ... made by a process patented in the United States. . . ." Clearly, Congress used similar language in each of the statutes to define the conduct it considers unlawful and unfair, *i.e.*, infringing conduct.

**d)     ITC and Federal Court Decisions Indicate  
§ 1337(a)(1)(B)(ii) Requires Infringement**

Fourth, both the ITC and the Court of Appeals for the Federal Circuit have considered the meaning of "covered" in § 1337(a)(1)(B)(ii) and have construed it synonymously with "infringement." In *In The Matter of Certain Recombinantly Produced Human Growth Hormones*, Inv. No. 337-TA-358, the respondent BTG was accused of violating § 1337(a)(1)(B)(ii) by importing into the United States human growth hormone produced outside the United States by a process covered by the claims of a United States patent. The Commission implicitly construed "covered" as meaning "infringing," stating:

Here, as in *Amgen*, jurisdiction is based on the importation of a product that allegedly was made by an infringing process. The issue of infringement is an issue that relates to the merits of the case; and is "not material to the issue of jurisdiction." .

1994 ITC LEXIS 640, \*90 (*citing* Amgen, 902 F.2d at 1536) (emphasis added). *See also, In the Matter of Certain Recombinant Erythropoietin*, Inv. No. 337-TA-281, 1989 ITC LEXIS 57, \*14 (April 10, 1989)("the importation of an article manufactured abroad **through the use of a process which, if practiced in the United States, would infringe a valid and unexpired U.S. patent** is an unfair act under § 337") (emphasis added).

Similarly, the Federal Circuit has construed "covered" in § 1337(a)(1)(B)(ii) as being synonymous with infringement. In *Amgen Inc. v. United States International Trade Commission*, 902 F.2d 1532 (Fed. Cir. 1990), the Court stated:

The parties expend much effort trying to convince us of what exactly the plain meaning of the word "covered" is. While the meaning of this word can vary slightly depending on the context, we are of the opinion that in the normal parlance among patent lawyers, to whom patent statutes are directed, a patent "covering" a process is a patent containing at least one claim defining a process.

*Id.* at 1538.

The Court went on to conclude that "[s]ince none of the claims of the '008 patent **cover** the process *performed overseas by Chugai*, Amgen's complaint under section 1337(a)(1)(B)(ii) must be dismissed." *Id.* at 1540 (emphasis added). In other words, because none of the asserted claims "covered" Chugai's process, Chugai did not *infringe* any of the asserted claims, there was no act of unfair competition under § 1337(a)(1)(B)(ii), and the investigation was dismissed.

In another case, the Federal Circuit has stated:

The purpose of section 337 from its inception was to provide relief to United States industry from **unfair acts**, including **infringement of United States patents** by goods manufactured abroad.

*Lannom*, 799 F.2d at 1580 (emphasis added).



e)     **Interpreting § 1337(a)(1)(B)(ii) As Requiring  
Infringement Is Necessary To Avoid Conflict With  
Other Provisions of § 1337**

Fifth and finally, Flexsys' construction of § 1337(a)(1)(B)(ii) directly conflicts with § 1337(c), which provides, in part: "All legal and equitable defenses may be presented in all cases." Clearly, non-infringement is a complete defense to a claim of patent infringement. 35 U.S.C. § 282 ("The following shall be defenses in any action involving the ... infringement of a patent . . . (1) [n]oninfringement ...."). Flexsys' interpretation of § 1337(a)(1)(B)(ii) would preclude KKPC from establishing the defense of non-infringement based on the fact that no entity or entities solely or jointly carried out all steps of the asserted process claims, and therefore would directly conflict with the rights provided KKPC under § 1337(c). However, "[e]ach part or section of a statute should be construed in connection with every other part or section so as to produce a harmonious whole . . . ." *San Huan New Materials High Tech, Inc. v. U.S. Int'l Trade Comm'n*, 161 F.3d 1347, 1351 (Fed. Cir. 1998) (citations omitted). Flexsys' proposed interpretation clearly violates that canon of statutory interpretation. At the very least, if Congress had intended to eliminate the requirement to prove infringement by some entity related to the accused imported products, Flexsys should be required to point to some clear indication of that intent in the statutory language or the legislative history. Flexsys does not and cannot because Congress had not such intent for § 1337(a)(1)(B)(ii).

Flexsys argues that this inconsistency is merely a "red herring" because "'defenses' refers to defenses that are available under the applicable statute." (Flexsys Petition at 19). However, Flexsys' argument begs the question because Flexsys merely *assumes* that non-infringement is not an available defense in an action under §1337(a)(1)(B)(ii). To the contrary, however, section 337 "authorizes the Commission to consider 'all legal and equitable defenses' . . .," including non-infringement. *Lannom*, 799 F.2d at 1580. Indeed, in the recent *Kinik* case, which both

parties cite, the action was brought specifically under §1337(a)(1)(B)(ii) and both the Commission and the Federal Circuit recognized the defense of non-infringement, which as here was successfully presented. *Kinik Co., v. U.S. Int'l Trade Comm'n*, 362 F.3d 1359, 1363-66 (Fed. Cir. 2004).

## **2. The Legislative History Clearly Requires Infringement**

While the language of §1337(a)(1)(B)(ii) plainly contemplates infringement, Flexsys argues for an interpretation of the statute that excludes infringement as a requirement. Accordingly, it is appropriate to look to the legislative history of §1337(a)(1)(B)(ii) to illuminate the intent of Congress. Flexsys' petition significantly mischaracterizes that history in an attempt to focus the Commission on the *in rem* nature of the ITC's jurisdiction, rather than the substantive merits of what conduct constitutes unfair competition under the statute. Flexsys' petition highlights several words and phrases in the legislative history, which it takes out of context, while ignoring the statements that clearly show the true reasons and intent of Congress in enacting the law.

Flexsys correctly points out that the predecessor statute of §1337(a)(1)(B)(ii) was originally enacted in response to the CCPA's decision in *Amtorg Trading Corp., supra*. However, Flexsys gives short shrift to the *Amtorg* decision, which is important to understand in order to discern Congress' intent in enacting §1337a.

The *Amtorg* case involved a United States patent that claimed a process for separating components of mined ores. Respondent Amtorg used the patented process in Russia to separate the ore components, and subsequently imported the components into the United States. No patent coverage existed for the ore components themselves. A U.S. competitor of Amtorg filed a complaint under § 1337 alleging that Amtorg's practice of the process and importation of ore

components into the United States constituted unfair competition in violation of the statute. The Tariff Commission agreed, and Amtorg appealed.

On appeal, the CCPA determined that the territorial scope of complainant's process patent was limited to the United States, and that Amtorg did not infringe the patent by performing the steps of the patented process outside the United States. The Court thus concluded that Amtorg's subsequent importation of the unpatented components into the United States was not an act of unfair competition in violation of §1337. *Id.* at 831-35. In reaching its conclusion, the CCPA clearly required infringing conduct as a prerequisite to a determination of unfair competition in violation of §1337:

We are unable to see wherein, if the question of unfair competition fell with the finding that there had been no infringement of the copyright laws in the Hurn Case, *supra*, it must not also be held that **"unfair methods of competition and unfair acts in importation"** [quoting the statute] of the merchandise here involved fall when it is determined, as it must be, that there was no infringement of the patented processes, since, under the facts found, the alleged unfair methods and acts related solely to the use of such processes.

*Id.* at 834 (emphasis and parenthetical added). The Court further noted that in enacting §1337, there was no indication Congress had intended to expand the scope of substantive rights with respect to process patents beyond that which already existed in the law:

Such must be the holding unless the court finds that it was the purpose of the Congress in enacting section 337 of the Tariff Act of 1930 (19 U.S.C.A. §1337) to broaden the field of substantive patent rights, and create rights in process patents extending far beyond any point to which the courts have heretofore gone in construing the patent statutes.

Mature consideration of the question leads us to the conclusion Congress did not do this.

*Id.* at 834.

Against this backdrop, Congress enacted §1337a, the predecessor of §1337(a)(1)(B)(ii), which read as follows:

The importation for use, sale or exchange of a product made, produced, processed, or mined under or by means of a process covered by the claims of any unexpired valid United States letters patent, shall have the *same status* for the purposes of section 337 of this title as the importation of any product or article covered by the claims of any unexpired valid United States letters patent. (emphasis added).

In enacting §1337a, Congress was certainly aware of the *Amtorg* court's determination that Congress had not chosen to expand the scope of substantive patent rights pertaining to process patents beyond what already existed in the law. Had Congress determined to extend the substantive scope of rights with respect to process patents beyond the scope that already existed in the law, it certainly could have. However, instead it simply gave process patent holders the **same** rights as holders of apparatus patents. Clearly Congress was aware that, in order to demonstrate infringement of a process patent, it was necessary to show an entity, such as *Amtorg*, performed each of the steps of the claimed process. Congress could have done away with that requirement, as *Flexsys* now urges the Commission to do, but it did not.

Indeed, Congress apparently did not even consider enlarging the scope of substantive rights with respect to process patents to eliminate the need to show infringing conduct. The various comments, reports and testimony Congress received while considering §1337a all focused on preventing entities from avoiding infringement merely by moving the practice of their processes outside the United States. Not one of them suggested that Congress should remove the requirement to demonstrate infringing conduct in order to find an act of unfair competition under §1337.

The Tariff Commission reported that as a result of *Amtorg*:

The owner of a process patent issued in the United States has now no protection of any kind against the **use** of that patented process **without his consent** outside the United States, and the importation into and sale within the United States of goods made by the process. The patentee may not proceed against the **user of the process** because the patent grant of exclusive rights to use the patented process does not extend beyond the limits of the United States; he may not proceed against the importer of goods made by the process because, under the existing patent law, his sole right is against the user of the process .... S. Rep. No. 76-1903 at 2 (1940); H.R. Rep. No. 76-1781 at 1-2 (1940) (emphasis added).

Witnesses testified that:

The decision in the Amtorg Trading cases means that any process developed in this country by research and investigation, covered by a U.S. Patent, can be taken over or **stolen by a foreign government, firm, or individual**, and the products made thereunder can be imported into the United States without recourse .... **[E]nactment of this bill will merely give the same right to a U.S. process patent that is now accorded to the holder of a U.S. product patent.** Sen. Rep. of Proceedings Held Before the Comm. on Mines and Mining, May 17, 1940, at 17, 19-20.

As a result of all this, the Senate concluded that:

Since the Amtorg decision owners of American process patent are helpless to **prevent the infringement abroad** of their patent rights. **This bill will give them the same rights which the owners of product patents have.** S. Rep. No. 76-1903 at 3 (1940) (emphasis added).

The highlighted portions of the foregoing excerpts from the legislative history clearly show Congress was concerned with preventing unfair offshore *infringement* of U.S. process patents and resulting importation of products into the United States. The testimony, the Tariff Commission report, and the Senate's conclusion all demonstrate that the conduct envisioned by Congress to be prohibited was conduct that, but for its geographic location outside the United States, would otherwise be infringing under existing U.S. patent law. Nowhere in the legislative history is there any indication of Congressional intent to expand either the substantive law

relating to what constitutes infringement of a process patent, or § 1337, to prohibit conduct that would not otherwise be deemed an infringement if it occurred in the United States. Indeed, the Senate's conclusion that the enacted legislation would merely provide owners of process patents the "*same rights*" as owners of product patents demonstrates that no expansion of infringement law with respect to process patents was contemplated beyond prohibiting the offshore practice of a patented process that would infringe if carried out in the United States.

Flexsys highlights a number of words and phrases from the legislative history which are designed to direct the Commission's attention away from Congress' intent in enacting the statute, and to focus solely on the importation aspect of the statute. *See* Flexsys Petition at pp. 9-10. However, Flexsys completely ignores the language that shows Congress was not concerned with just any importation of articles made by a patented process, but only with the *unfair importation* of articles resulting from performance of a process that would otherwise would be an infringement if carried out in the United States.<sup>4</sup>

Congress' intent is clearly shown by the use of words like "steal," "stolen," "infringing" and "infringer" in the legislative history. In light of *Amtorg*, the legislative history of the statute shows a clear intent to require proof of infringing conduct in order to find an act of unfair competition in violation of §1337(a)(1)(B)(ii). Conversely, nothing in the legislative history shows any intent by Congress to expand the scope of rights enjoyed by process patent holders beyond the same rights enjoyed by holders of apparatus patents. Both classes of patent holders must show an act of infringement with respect to the imported article in order to establish unfair competition in violation of the statute.

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<sup>4</sup> *See Certain Plastic Molding Machines*, Inv. No. 337-TA-462, 2003 ITC LEXIS 417, \* 31(July 2003) (refusing to interpret statute in certain way "merely because some language [from the statute and legislative history], when viewed out of context, can be cited to support such an interpretation").

In 1988, Congress repealed §1337a in connection with the Process Patents Amendment Act, and enacted new §1337(a)(1)(B)(ii) in its place. However, in doing so Congress made no substantive changes to the scope or intent of the statute. *Amgen*, 902 F.2d at 1538, 1540 n.13. Indeed, Senator Lautenberg, one of the sponsors of the Act summarized the intent of the statute:

Section 337(a)(1) (a reenactment of section 337a) will provide the assistance necessary for emerging U.S. industries, such as the biotechnology industry, to compete in a marketplace without interference due to **unfair acts** of foreign competitors. The continued broad jurisdiction of the International Trade Commission will help U.S. industry address the **unfair activity** of foreign competitors who, for example, import products manufactured using patented genetic engineering technology. **Merely moving manufacture offshore does not absolve the wrongdoer from the requirement to compete fairly. This Trade Act protection prohibits the foreign enterprise from taking jobs from American workers by doing offshore that which they could not lawfully do in the United States.**

*Id.* at 1539 (emphasis added).

Senator Lautenberg's statements clearly show Congress' intent in enacting §1337(a)(1)(B)(ii) was the same as when it enacted 1337a: to prevent conduct by "wrongdoers" that is "unfair" in the sense that is conduct that would not be lawful if carried out in the United States. Nothing in Senator Lautenberg's statement indicates an intent by Congress to reach conduct, such as KKPC's conduct here, which does not involve any infringing acts, and which would be lawful even if carried out in the United States.

### **3. The Legislative History Of 35 U.S.C. §271(g) Does Not Support Flexsys' Interpretation of § 1337(a)(1)(B)(ii)**

Flexsys argues inconsistently that the ALJ should not have considered whether infringement exists under 35 U.S.C. §271(a) in determining whether there is a violation of §1337(a)(1)(B)(ii), because they are separate statutes; but that the Commission should consider 35 U.S.C. §271(g) in interpreting the scope of §1337(a)(1)(B)(ii), even though they are separate statutes. In fact, §271(g) is a different statute, enacted at a different time, and with a different

legislative history than §1337. It has little relevance to §1337, the legislative history of which, as discussed above, clearly indicates that its purpose was to prevent the avoidance of *infringement* by moving outside the United States the performance of processes, which conduct would otherwise infringe.<sup>5</sup>

In the case of §271(g), the legislative history indicates that the purpose of the statute was to equalize the protection afforded owners of process patents with that afforded owners of product patents under §271(a), and also to put U.S. process patent holders on a competitive footing with process patent holders in other industrialized nations that already protected their interests. *See* H.R. Rep. No. 100-60 at 8-9. Congress specifically distinguished the "trade-type protection" already available under §1337(a)(1)(B)(ii) from the "patent-type protection" made applicable by §271(g), noting that the statutes provided different procedures, different remedies, and different statutory criteria. *Id.*; *see, e.g., Bayer AG v. Housey Pharms., Inc.*, 340 F.3d 1367, 1373 (Fed. Cir. 2003) (distinguishing §271(g) and §1337(a)); *Bristol-Myers Co. v. Erbamont, Inc.*, 723 F. Supp. 1038, 1041 n.10 (D. Del. 1989) (same); *Diversified Prods. Corp. v. Weslo Design Int'l, Inc.*, 616 F. Supp. 1134 (D. Del. 1985) (same); *In the Matter of Certain Process, Apparatus, and Components Thereof*, Inv. No. 337-TA-313 (Oct. 17, 1990) (same). Thus, the legislative history and application of §271(g) is irrelevant to the §1337(a)(1)(B)(ii) claims against KKPC that are at issue in this proceeding.

This interpretation is confirmed by the fact that as part of the same legislation that enacted §271(g), the Omnibus Trade and Competitiveness Act of 1988, 100 P.L. 418, Congress

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<sup>5</sup> Contrary to Flexsys' criticism of the ALJ, the Commission routinely determines whether there is infringement under §271(a) in determining whether there has been a violation of §1337(a)(1)(B)(ii). *See Kinik*, 362 F.3d at 1363-66; *In The Matter of Certain Recombinantly Produced Human Growth Hormones*, Inv. No. 337-TA-358, 1994 ITC LEXIS at \*90; *In the Matter of Certain Recombinant Erythropoietin*, Inv. No. 337-TA-281 (April 10, 1989).



also amended former §1337 to enact what is now §1337(a)(1)(B)(ii). Thus, Congress had before it the possibility of amending either or both of §1337 and §271 at the same time, and specifically discussed the interactions and differences between the two as well as the historical interpretation of both statutes. Yet Congress chose **not** to amend substantively §1337 or expand its scope along the lines that Flexsys is now advocating. *See Amgen*, 902 F.2d at 1538, 1540 n. 13. This demonstrates **both** that Flexsys' reliance on the legislative history of §271(g) to construe the scope of § 1337(a)(1)(B)(ii) is misplaced,<sup>6</sup> **and** that Congress did not intend to broaden the scope of § 1337(a)(1)(B)(ii) beyond its previous parameters. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 381-82 & n.66 (1982) (Congress is presumed to be aware of interpretations of existing statute and to adopt those interpretations when it reenacts the statute without change); *Strickland v. United States*, 423 F.3d 1335, 1340 (Fed. Cir. 2005) (same).

Flexsys' quotation of a passage from the legislative history of §271(g) to support its claim that §1337(a)(1)(B)(ii) is *in rem*, is both misleading and inapposite. Flexsys has taken the quoted passage entirely out of context. In the legislative history, the passage appears as part of a discussion of the argument of certain experts that the remedies already available under §1337(a)(1)(B)(ii) were adequate to protect the rights of process patent holders. The passage, in full, reads as follows:

Some experts analyzing process patent legislation, on the other hand, maintain that the ITC remedy in its current form is adequate and the appropriate way of addressing the problem of infringing importations. They point out that the ITC exercises *in rem* rather than *in personam* jurisdiction: its orders go only to the goods themselves that are being imported and used or sold here. These experts contend that this focus on the goods is fair because once the goods have passed beyond the hands of the original manufacturer, the persons handling them can no longer be assumed

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<sup>6</sup> *See Amgen*, 902 F.2d at 1540 n.13 (rejecting argument that language of §271(g) had bearing on proper interpretation of language of §1337(a)(1)(B)(ii)).

to be knowledgeable of the process used to make the goods. This situation differs from the analogous one involving product patents, because in a case involving product patents, the person holding the goods actually has in hand everything necessary to ascertain whether there is infringement of a patent.

S. Rep. No. 100-83 at 39. It is manifestly clear that this passage does not support the proposition for which Flexsys cites it, namely that §1337(a)(1)(B)(ii) focuses on the product rather than the actors who carry out the patented process overseas. Rather, the passage addresses only the basis for the ITC's jurisdiction under §1337(a)(1)(B)(ii). In any event, a quotation from the legislative history of §271(g) has no bearing on the proper interpretation of §1337(a)(1)(B)(ii). *See Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1354 (Fed. Cir. 2001) ("It is well-established that 'the view of a later Congress cannot control the interpretation of an earlier enacted statute.'" (citations omitted)).

KKPC certainly does not contest that the ITC has *in rem* jurisdiction under §1337(a)(1)(B)(ii). *See, e.g., Sealed Air Corp. v. U.S. Int'l Trade Comm'n*, 645 F.2d 976, 986 (CCPA 1981); *In the Matter of Certain Variable Speed Wind Turbines and Components Thereof*, Inv. No. 337-TA-376 (May 30, 1996). But the issue here is not jurisdictional, it is substantive, i.e., what conduct constitutes unfair competition under § 1337(a)(1)(B)(ii). Flexsys asserts not just that the ITC's *jurisdiction* is *in rem*, but that the ITC's *in rem* jurisdiction somehow supplants or supercedes the necessity for it to show *substantively* conduct that constitutes unfair competition under §1337(a)(1)(B)(ii), in this case infringing conduct by KKPC. This argument makes no sense, and certainly is not supported by the limited authority Flexsys cites. To the contrary, the ITC has expressly distinguished between the jurisdictional and substantive issues, noting that "[t]he issue of infringement is an issue that relates to the merits of the case; and is 'not material to the issue of jurisdiction.'" *In the Matter of Certain Recombinantly Produced Human*

*Growth Hormones*, 1994 ITC LEXIS at \*40 (citing *Amgen*, 902 F.2d at 1536). While the jurisdictional and substantive issues obviously are related, *see Amgen*, 902 F.2d at 1536, the jurisdiction determination does not and cannot supercede or predetermine the outcome of the infringement analysis. *See In the Matter of Certain Hardware Logic Emulation Systems and Components Thereof*, Inv. No. 337-TA-383 at 158 (Oct. 9, 1997) (noting that arguments related to jurisdiction and remedy are interrelated with merits of contributory infringement claim, and going on to rule on merits of infringement claim).

Nor is Flexsys helped by the assertion that the ID's interpretation of §1337(a)(1)(B)(ii) would invite respondents to invoke an "ostrich defense" and claim that they had no idea what process their co-respondent was applying. First, Flexsys' assertion is pure speculation, and clearly is not consistent with the facts in this case. Indeed, in this case, the undisputed evidence demonstrated that KKPC attempted to determine Sinorgchem's process, but was unable to because Sinorgchem maintained it as a trade secret. (ID at 105; RFF 9.151, 9.153, 9.154, 9.155).

Second, the fact is that the absence of knowledge that a co-respondent is carrying out the steps of a process patent *can* constitute a defense to a claim under §1337(a)(1)(B)(ii) in particular factual circumstances to the exact same extent as it would in the United States. There is nothing that prevents the ALJ from assessing the merits of that defense along with making whatever other findings of fact are necessary in the context of each particular case. Certainly the challenges of such fact-finding cannot justify Flexsys' attempt to interpret §1337(a)(1)(B)(ii) as imposing some sort of strict liability. Such an interpretation is not supported by the language of the statute, its legislative history, or the extensive case law that requires an entity to either carry out all steps of the process itself or to act jointly with other entities in doing so in order to be subject to the provisions of the statute.

**C.     The ID Of No Violation With Respect To KKPC Is Consistent With  
The Policies Underlying §1337(A)(1)(B)(ii) And Is Logical**

As demonstrated in the preceding sections, the clear policy behind §1337(a)(1)(B)(ii) is to prevent manufacturers of articles from circumventing the infringement of U.S. process patents by moving their manufacturing processes outside the United States, and to prevent unfair competition by their subsequent importation of the resulting articles. The ID with respect to KKPC is completely consistent with this policy. The ID correctly found that KKPC did not engage in any conduct in producing its 6PPD product that would constitute infringement of Flexsys' process patents if it had occurred in the United States. Thus, KKPC did not attempt to avoid infringement by carrying out otherwise infringing conduct outside the United States, and it did not engage in any unfair competition in importing its 6PPD product into the United States. See *Amtorg*, 75 F.2d at 834 (conduct that is not infringing under the law does not constitute "unfair methods of competition" or "unfair acts in importation").

Flexsys argues that (1) the ID determined that KKPC's imported 6PPD was made by a process covered by the claims of the patents, and (2) therefore the results of the ID are illogical. Flexsys' premise is wrong, and therefore its argument fails. (Flexsys Petition at 20).

Flexsys' premise is wrong because the ID correctly found that KKPC made its 6PPD using only a single reductive alkylation step, a step that was well known in the prior art long before Flexsys' asserted patents were filed. (ID at 103). The ID also correctly found that KKPC's reductive alkylation process does not react aniline and nitrobenzene, control the amount of protic material, or perform any of the other steps of the patented processes. (ID at 103). The ID also correctly found that this was a case in which KKPC and Sinorgchem operated independently and separately, not jointly or with any connection, such that Sinorgchem's activities legally could not be attributed to KKPC, as Flexsys so desperately attempts to do in its

petition. (ID at 104-105). Flexsys does not dispute or seek review of any of these factual findings.

Based on these undisputed findings, there is nothing illogical about the ID with respect to KKPC. Flexsys tries to compare KKPC to Sovereign, but there is no logical comparison to be made. Sovereign was found to import 6PPD that was made by Sinorgchem according to the patented processes, as construed by the ALJ. In stark contrast, the 6PPD KKPC imported was not made by Sinorgchem and was not made by the patented process. Indeed, if the ALJ's claim construction is correct, it is both consistent with the policies behind §1337(a)(1)(B)(ii) and logical for the ALJ to find a violation with respect to Sovereign's importation of 6PPD and not with respect to KKPC's.

Flexsys speculates that this ID will invite foreign entities to eviscerate §1337(a)(1)(B)(ii) "by conspiring to separately, but collectively, practice the steps of processes covered by U.S. patents." (Flexsys Petition at 20). Aside from the fact that Flexsys is engaging in mere, unsupported speculation, its concern is baseless for at least two related reasons. First, by definition, if foreign entities "conspire" to carry out the steps of a U.S. process patent, they are not acting separately. Second, such entities can no more avoid infringement when they conspire abroad than they could by doing so in the United States under the current law, much of which is cited herein.

Similarly, Flexsys argues that KKPC's witnesses who testified that KKPC was (and is) unaware of Sinorgchem's process were not truthful. (Flexsys Petition at 21). To the extent Flexsys is arguing the credibility of the witnesses here, it suffices to say that such argument is inappropriate in the context of a petition for review. Rather, the place for such an argument was

in post-hearing briefing to the ALJ, who heard the witnesses and whose responsibility it was to assess their credibility.

To the extent Flexsys is arguing the ALJ erred in his factual determination that KKPC does not know Sinorgchem's process, which is not at all clear from the petition, Flexsys must demonstrate that the finding is "clearly erroneous." 19 C.F.R. § 210.43(b)(i). However, all Flexsys points to is irrelevant speculation. For example, Flexsys argues that KKPC knew about *Flexsys'* patented process and that Flexsys was able to discern Sinorgchem's process by visiting Sinorgchem's plant. From that, Flexsys *speculates* that as a customer of Sinorgchem KKPC was in a better position to learn Sinorgchem's process. However, Flexsys does not point to any evidence that KKPC ever visited Sinorgchem's plant or observed its process, or was told its process. To the contrary, the undisputed evidence of record, on which the ALJ based his factual finding, was that KKPC had not visited Sinorgchem's plant, that Sinorgchem maintained the process as a trade secret, and that Sinorgchem refused to tell KKPC the process even when KKPC asked. (ID at 104-105; RFF 9.151, 9.153, 9.154, 9.155). In short, to the extent Flexsys seeks to overturn the ALJ's factual finding on review, it has sorely failed to meet its burden to demonstrate that finding is "clearly erroneous."<sup>7</sup>

Finally, throwing in the kitchen sink, Flexsys argues that KKPC now knows Sinorgchem's process infringes and therefore now should be found in violation of §1337(a)(1)(B)(ii). (Flexsys Petition at 22). This argument defies both law and logic. First, a

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<sup>7</sup> Flexsys also takes the opportunity to slander Mr. Lim of KKPC, by asserting that Mr. Lim hid documents. (Flexsys Petition at 20-21). As Flexsys is well aware, Mr. Lim explained at the hearing that the documents in question had nothing to do with KKPC's interactions with Sinorgchem or any knowledge of Sinorgchem's process. Rather, they had to do with the operation of KKPC's joint venture with Monsanto, while it was still extant. Indeed, Sinorgchem was not even on the horizon at that time, since Monsanto/Flexsys were still supplying KKPC with 4-ADPA. Flexsys' assertion that this testimony relates to KKPC's alleged knowledge of Sinorgchem's process is simply a blatant misrepresentation of the record.

determination the statute has been violated must be based on the record. 19 C.F.R. §210.42. As just demonstrated above, the record evidence clearly demonstrates KKPC does not know Sinorgchem's process. Moreover, Flexsys has not proven any of the other elements necessary for a violation to be found *now*, including production or importation of any article. Indeed, there is no evidence that even if KKPC now knows Sinorgchem used an infringing process in the past, KKPC knows Sinorgchem is still using that process or will use it in the future. Thus, there is no factual basis, let alone factual basis of record, on which KKPC can now properly be found in violation of the statute.

Finally, this is not a proper matter for review. Rather, it is a procedurally improper request for entry of a new initial determination, not based on any factual record. It is completely inappropriate for Flexsys to request the Commission to consider such a matter on review.

**D. The Avery And Dupont Cases Do Not Support Flexsys' Position That No Proof Of Infringing Conduct Is Required With Respect To Production Of The Imported Article**

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Flexsys' arguments based on the *Avery Dennison* and *Dupont* cases miss the mark. (Flexsys Petition at 22-27). Both cases deal with §271(g), not §1337(a)(1)(B)(ii), which as explained above is a different statute enacted at a different time and with a different legislative history. To the extent either case has applicability to the present investigation, *Avery I* and *II* are clearly more applicable because they deal with an independent seller-customer situation like that present in this investigation. In contrast, the *Dupont* case is clearly distinguishable on its facts.<sup>8</sup>

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<sup>8</sup> Flexsys contends that *Avery* is contrary to the arguments made in KKPC's post-hearing reply brief. (Flexsys Petition at 22). However, KKPC did not cite *Avery* or make any arguments about the case in its post-hearing reply brief. KKPC did cite *Avery* at p. 41 of its post-hearing brief in order to quote the Court's determination that "like §271(a), §271(g) imposes liability for direct infringement." However, other than that determination, which supports KKPC's point that not merely importation but infringing conduct must be found, KKPC did not discuss the case.

Flexsys expressly bases its argument with respect to *Avery* on speculation as to what the court might have done if the facts had been different. (Flexsys Petition at 22). Further, Flexsys' arguments are based on dicta in both cases about potential infringement by entities that were not parties to the proceedings, where those issues were neither analyzed nor necessary to the courts' determinations. In particular, the dicta in the *Dupont* case concerning alleged infringement by a non-party customer is against the weight of authority established by courts that have actually considered that issue.

In *Avery I*, as Flexsys refers to it, Avery alleged that UCB Films was liable for direct infringement of certain process claims having several steps under §271(a). Avery filed a motion for summary judgment contending it did not carry out all of the steps of the claimed process and therefore did not infringe. Avery performed the first step of forming a "face stock." It then sold the face stock to customers in the United States called "laminators." The laminators performed another step but did not complete the process before selling the product to another set of customers called "converters." Neither the laminators nor converters were parties, and none of them were accused of infringement. The Court stated that the converters "*may* perform the remaining step of the process" and "the convertors are *potential* direct infringers." However, the Court did not analyze this issue, did not make findings in this regard, and thus this discussion is pure dicta. What the Court did conclude was that "UCB cannot be held liable for direct infringement" because it did not carry out all of the steps of the claimed process. The Court granted UCB's motion on that basis.<sup>9</sup> *Avery*, 1997 WL 567799 at 5 (N.D. Ill. 1997).

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<sup>9</sup> Flexsys does not contend that the *Avery I* court did not properly grant summary judgment under §271(a). However, it argues that the *Avery I* court denied summary judgment under §271(b) "because the 'laminators' and 'converters' performed the remaining steps of the claimed process." (Flexsys Petition at 23-24). That is absolutely wrong. The Court denied UCB's motion for summary judgment that it did not induce infringement under §271(b) because it found there was a genuine issue of material fact based on



To the extent the *holding* in *Avery I* is applicable to the present case, it is because the Court held an entity that does not perform all of the steps of a claimed process cannot be held to directly infringe under §271(a) as a matter of law. That is what the ALJ concluded with respect to KKPC as well. Flexsys raises the issue of what would have happened if the facts had been different, and the Court had UCB's customers before it as well as UCB.

Extrapolating from the result, it is entirely likely the Court likewise would have found the customers not to directly infringe. As in the present situation, there was no evidence that UCB had any connection with any of the customers and no evidence that there was any relationship between them other than that of seller and buyer on the open market. As such, the Court would not have adopted the reasoning of the *Dupont* case, as argued by Flexsys. Indeed, the *Avery* court specifically noted that in *Dupont* "the party who bought the polymer ... thereby essentially paid Monsanto and BASF to practice step (a) of the patented process." *Id.* at 3. Instead, the Court would have looked to cases like *Canton Bio-Medical*, and *Joy Technologies*, which hold that an entity can only infringe a process claim by carrying out all of the recited steps of the process. And, the Court would have looked to the significant number of cases in which courts faced with the issue have held that, in order for multiple entities to jointly infringe a process claim, there must be some connection between them, such as where one entity carries out steps for the other (like in *Dupont*), where there is an agency relationship between the entities, or where there is some involvement by one entity in how another entity carries out part of the process, for example by specifying materials, etc. *See, e.g., Shields*, 493 F. Supp. at 1389; *Ralston Purina*, 586 F. Supp. at 1226; *Metal Film Co.*, 316 F. Supp. at 110 n. 12; *Marley*

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UCB's promotion of its product to the customers for use with subsequent process steps to make labels. *See* 1997 WL 567799 at 5.

*Mouldings*, 2003 WL 1989640. Based on the weight of applicable and relevant authority, the *Avery* Court would likely have found UCB's customers also not liable for direct infringement under §271(a). See *Fromson*, 720 F.2d 1565; *Faroudja Labs.*, 1999 WL 111788 at \*5.

The opinion in *Avery II*, as Flexsys notes, was issued in response to a request for clarification of the Court's *Avery I* order. The clarification sought was the extent to which the Court's order also disposed of the *Avery*'s allegation of infringement under §271(g). The Court made clear that infringing conduct must be shown under both provisions:

[L]ike §271(a), § 271(g) imposes liability for direct infringement. As this court found in its prior opinion, plaintiff cannot show that defendant directly infringed either process patent in suit under § 271(a), and the court finds that the same reasoning applies to § 271(g).... Both sections deal with direct infringement; §271(a) deals with the production, use, or sale of patented inventions, while §271(g) deals with importation, sale, or use of products made by a process patented in the United States. Because defendant is alleged to have performed at most an initial step of the process patent, it cannot be held liable for direct infringement from sale of the final product. *Id.*

(Citations omitted)

Flexsys contends the *Avery II* decision is distinguishable from the present situation because the *Avery II* Court found UCB was "alleged to have performed at most an initial step" of the patented process. However, the *holding* of *Avery II*, does not depend on that fact. The *holding* was that (1) §271(g) requires proof of infringing conduct (just as §1337(a)(1)(B)(ii) does), and (2) because UCB did not carry out all of the steps of the process, it was not liable for infringement under either §271(a) or §271(g). To that extent, the *Avery II* holding is applicable to the present situation because KKPC, like UCB, does not carry out all of the steps of the patented processes. Therefore, like UCB, KKPC cannot be held liable for infringement, and consequently has not engaged in an act of unfair competition in violation of §1337(a)(1)(B)(ii).

Flexsys contends that *Avery II* would have been decided differently if UCB had carried out the last step of the patented process, and forthrightly admits this is based on dicta in the *Avery II* opinion concerning the *Dupont* case. (Flexsys Petition at 25). Flexsys' argument is irrelevant because it is admittedly based on dicta and constitutes rank speculation. Nevertheless, reviewing the dicta to which Flexsys points, it is clear that Flexsys reads too much into it. The *Avery II* court did not signal one way or another how it would have decided if it had been faced with the facts in *Dupont*. It simply observed what the *Dupont* court did. See 1997 WL 665795 at \*2, n.4. Indeed, it is more likely, based on the weight of authority which is against *Dupont*, that the *Avery II* court would have reached the same conclusion even if UCB had carried out the last step of the process, because unlike the situation in *Dupont*, UCB did not cooperate with any of the other entities in carrying out the entire patented process.

Flexsys argues that "[t]he *Dupont* case [was] relied upon in *Avery II*." However, even a cursory reading of *Avery II* shows that is not correct. (Flexsys Petition at 25). While the *Avery II* court noted the *Dupont* case and explained what the *Dupont* court did, it in no way relied on it. In fact, *Dupont* was no more applicable to the situation in *Avery* than it is to the present situation. Flexsys makes much of the fact that in *Dupont*, the court found Monsanto liable for direct infringement under §271(g) of Dupont's patented processes for producing colored, stain resistant nylon fibers even though Monsanto did not itself carry out all of the steps of the patented process. (Flexsys Petition at 25-26). However, what Flexsys neglects to mention in its petition is that the *Dupont* court specifically found that Monsanto had entered into a "toll processing" agreement with its customer CaMac, under which Monsanto would supply CaMac with a compound made by the initial steps of the process, and CaMac would use that compound in the remaining steps of the process to produce nylon fibers for Monsanto, which it then returned to

Monsanto for sale. *Dupont*, 903 F. Supp at 720-21. That is the basis on which the court found Monsanto liable for direct infringement under §271(g) even though it did not itself carry out all the steps of the patented process. *Id.* at 733-34. Monsanto and CaMac contracted with each other to jointly perform all the steps of the patented process. *Dupont* is readily distinguishable from the present situation on that basis.

Here, in contrast, there is no evidence whatsoever that KKPC contracted with or otherwise arranged with Sinorgchem to carry out steps of the patented processes for KKPC. To the contrary, the ALJ properly found that KKPC and Sinorgchem are separate and independent entities and that the only relationship between them is that KKPC purchases 4-ADPA on the open market, just as it has done from other suppliers irrespective of the process used to produce the 4-ADPA. (ID at 104-105). Thus, the *Dupont* case is clearly inapplicable to this case and Flexsys' reliance thereon is misplaced.

Nevertheless, Flexsys argues that this is an even stronger case than *Dupont* for direct infringement because KKPC allegedly carries out the last step of the process. However, that is incorrect. There is no connection between KKPC and Sinorgchem, as the ALJ properly found, and therefore it cannot be said under the circumstances of this case that KKPC carries out the last step of the patented process. KKPC independently carries out a single step process of its own -- reductive alkylation -- a step that was well known in the prior art even before Flexsys' asserted patents were filed. This is not the last step of a multi-step process, which is what the patented process requires, but rather the only step of KKPC's process.

Finally, even if the *Dupont* case was not readily distinguishable on its facts, its legal conclusion is against the weight of authority in the situation where there is no connection

between the entities alleged to have jointly performed a patented process. In that instance, as here, infringement has not been found. *See, e.g., Fromson, supra; Faroudja, supra.*

**E. Flexsys Waived The Argument That KKPC Violated The Tariff Act By Selling For Importation Into The United States 6ppd Made "By Means Of" A Process Covered By Claim 30 Of The '063 Patent And Claim 7 Of The '111 Patent, And The Argument Is Without Merit In Any Event**

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In a last ditch effort to force a result that is not supported by the law or the facts of this case, Flexsys argues -- for the first time *after* the hearing -- that KKPC should be held liable under §1337(a)(1)(B)(ii) not because it carried out the steps of the asserted claims, but solely as an importer of 6PPD that was made "by means of" a patented process. This is no more than a back door attempt to achieve the expansion of liability under §1337(a)(1)(B)(ii) that, as demonstrated above, is wholly unjustified by the current statute and existing law. Flexsys' late attempt must fail both because it waived this newly constructed theory by failing to properly raise it for hearing, and because it lacks merit as a matter of law.

**1. Flexsys Waived The Argument That KKPC's 6PPD Is Made "By Means Of" A Process Covered By Claim 30 Of The '063 Patent And Claim 7 Of The '111 Patent**

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In a belated effort to avoid a finding of no violation as to KKPC, Flexsys has made an 11<sup>th</sup>-hour alternative allegation that "the 6PPD KKPC imported into the United States was made by a process covered by claim 30 of the '063 patent and claim 7 of the '111 patent." (Petition at 28).<sup>10</sup> As noted in the Petition, however, Flexsys first made this contention in its Post-Hearing Reply Brief to which Respondents and the Staff were unable to respond. (Petition at 29). This contention, therefore, is untimely and must be deemed waived. *See Certain HSP Modems,*

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<sup>10</sup> Claims 30 and 7 are both directed to multi-step processes of making 4-ADPA, which it is undisputed KKPC does not produce by any process. KKPC produces only 6PPD.

*Software and Hardware Components Thereof, and Products Containing Same*, Inv. No. 337-TA-439, Initial Determination at 139 (October 18, 2001) ("Although Respondent raised a non-enablement argument in its post-hearing reply brief, neither Complainant nor the Staff had an opportunity to reply to this final brief. Accordingly, that contention will not be considered and the written description and non-enablement defenses are deemed to have been waived.").

Flexsys has never accused KKPC of infringing either claim 30 of the '063 patent or claim 7 of the '111 patent. No such allegation is made in the complaint,<sup>11</sup> the claim charts, Flexsys' discovery responses, or even in Flexsys' Pre-Hearing Brief. *See, e.g.*, Complaint ¶¶ 47-48; Exhibit 15 to the Complaint; RX-354 and RX-356. The only claims that KKPC has ever been alleged to infringe are claim 61 of the '063 patent and claim 11 of the '111 patent. *Id.*<sup>12</sup> Failure to include the contention in its Pre-Hearing Brief constitutes waiver of that contention under the Ground Rules governing this investigation. Gr. R. 9(e) ("Any contentions not set forth in detail as required herein shall be deemed abandoned, or withdrawn, except for contentions of which a party is not aware and could not be aware in the exercise of reasonable diligence at the time of filing the pre-hearing statements.") Flexsys, therefore, is barred from now alleging infringement by KKPC of new claims of the patents at issue. Moreover, the Commission need not consider

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<sup>11</sup> Commission Rule 210.12(a)(9)(vi), 19 C.F.R. § 210.12(a)(9)(vi), requires that a complaint in a patent-based Section 337 investigation include "a reference to the **specific claims** in each involved U.S. letters patent that allegedly **cover** the article imported or sold by **each person named** as violating section 337 of the Tariff Act of 1930, or the process under which such article was produced." (Emphasis added). Flexsys' February 23, 2005 Complaint (supplemented March 10, 2005), at paragraph 48 and Exhibit 15, specifically alleged KKPC infringes claim 61 of the '063 patent and claim 11 of the '111 patent by KKPC, but not claim 30 of the '063 patent or claim 7 of the '111 patent.

It is also interesting to note that Flexsys is attempting to assert these new contentions that were not included in its complaint while at the same time it seeks to preclude KKPC from presenting evidence regarding its P1 and P2 process because Flexsys did not allege that these processes infringe in its complaint. Fairness requires that if KKPC is to be bound by the complaint, certainly Flexsys, who drafted and filed the complaint, must at least be equally bound.

<sup>12</sup> These claims are directed to production of 6PPD.

any issues that were not properly raised before the ALJ. *Hazani v. U.S. Int'l Trade Comm'n*, 126 F.3d 1473, 1476-77 (Fed. Cir. 1997). Accordingly, the Commission should disregard Flexsys' untimely argument as waived.

In addition to failing to assert infringement of claims 30 and 7, directed to the production of 4-ADPA, nowhere in Flexsys' pre-hearing brief did it identify its newly espoused theory that KKPC's 6PPD was made by means of those claimed processes. Accordingly, neither the respondents nor the ALJ had reasonable notice that such a theory was to be tried or decided. To the contrary, Flexsys previously espoused the theory that KKPC and Sinorgchem allegedly "jointly" infringed the asserted claims. Thus, for the same reasons given above, Flexsys waived this new theory. *See also Kinik*, 362 F.3d at 1367 .

A proper petition for review under 19 C.F.R. §210.43(b) must be from an issue decided in the initial determination. However, Flexsys admits the ALJ did not address its new theory in the initial determination because Flexsys did not raise it until its post-hearing reply brief. Therefore, Flexsys' petition on this point is unavailing and the Commission should decline to review it.

**2. Flexsys' Argument That KKPC's 6PPD Is Made "By Means Of" A Process Covered By Claim 30 Of The '063 Patent And Claim 7 Of The '111 Patent Is Without Merit As A Matter Of Law**

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Even if the Commission decides to review Flexsys' newly espoused "made by means of" theory, the theory is without merit as a matter of law. As discussed in the preceding sections, §1337(a)(1)(B)(ii) applies to activities that would constitute infringement if they were carried out entirely in the United States. As further demonstrated above, the 6PPD KKPC imported into the United States was **not** produced by an infringing process, because no single entity, or combination of connected entities acting jointly or collectively, carried out all of the steps of the

patented process to produce it. §1337(a)(1)(B)(ii) simply is not violated by the importation or sale of a product that -- like the 6PPD imported by KKPC -- was not made in an infringing manner.

The cases cited by Flexsys are completely inapposite. *Eli Lilly and Co. v. American Cyanamid Co.*, 896 F. Supp. 851 (S.D. Ind. 1995), involved a claim under §271(g). The court explained that §271(g) required the plaintiff to prove three things: that the product was produced pursuant to a patented process, that the product was then imported into the United States, and that the product was neither materially changed nor a "trivial and nonessential component" of another process. The court further noted that there was "little dispute" that the first two requirements were met -- in fact, the parties had *stipulated* to the first. And as Flexsys concedes, the last prong is not applicable to claims under §1337(a)(1)(B)(ii). *See Kinik, supra*. In the present investigation there clearly is no stipulation that KKPC's 6PPD was made by the patented process, in fact the evidence proved to the contrary, and therefore *Eli Lilly* has no bearing whatsoever on the issues here.

Similarly, in *Bio-Technology General Corp. v. Genentech, Inc.*, 80 F.3d 1553 (Fed. Cir. 1996), the Federal Circuit upheld the district court's finding that Genentech was likely to succeed on the merits of its claims that Bio-Technology General ("BTG") infringed its process patents. Thus, again, there was no issue regarding infringement. The issue discussed by Flexsys -- namely, whether BTG's product, hGH, was "made by" the patented process even though the claim was directed at production of a plasmid -- relied on legislative history of §271(g) that specifically addressed biotechnology process patents. Neither this issue, nor the legislative history cited by the court, bears in the least on the question whether KKPC can be liable under



§1337(a)(1)(B)(ii) as an importer of a product that was not made by infringing a patented process.

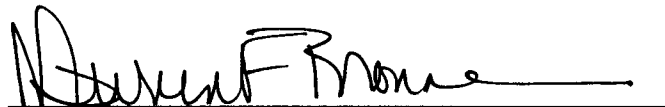
Moreover, in *Bio-Technology*, BTG asserted the relevant plasmid process claim against Genentech, whereas in the present situation, Flexsys failed to assert the equivalent 4-ADPA process claims against KKPC. The *Bio-Technology* case is inapposite for that reason as well.

#### IV. CONCLUSION

For all of the foregoing reasons, respondent KKPC respectfully urges the Commission to decline to review the ALJ's February 21, 2006, Final Initial and Recommended Determination, in which the ALJ correctly concluded under the undisputed facts and the existing law that KKPC did not infringe any asserted claims of Flexsys' patents in suit, and did not violate 19 U.S.C. §1337(a)(1)(B)(ii).

DATED: March 10, 2006

Respectfully submitted,



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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **RESPONSE OF KOREA KUMHO PETROCHEMICAL CO., LTD. TO COMPLAINANT FLEXXSYS AMERICA L.P.'S PETITION FOR REVIEW OF FINAL INITIAL AND RECOMMENDED DETERMINATIONS (PUBLIC)** was served as indicated, to the parties listed below, this 10th day of March 2006:

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